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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. NEWTON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

JAMES LUKIN DROUGHT
Attorney of Record
2400 InterFirst Plaza
San Antonio, Texas 78205
(512) 225-4031

PATRICIA J. SCHOFIELD
2400 InterFirst Plaza
San Antonio, Texas 78205

Attorneys for Petitioner

Of Counsel:

BRITE, DROUGHT, BOBBITT & HALTER
2400 InterFirst Plaza
San Antonio, Texas 78205

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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QUESTIONS PRESENTED FOR REVIEW

1. Does claimant James W. Newton have standing to contest the forfeiture to the United States government of the 18th century gold monstrance seized from his possession by U.S. Customs agents?

2. Does the holding that claimant James W. Newton lacked standing, combined with the rejection of his petition for remission, and the approval of the agreed judgment between the governments of the United States and the Republic of Colombia, deprive James W. Newton of property without due process of law?

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PARTIES

1. James W. Newton
2. The United States
3. The Republic of Colombia

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OPINIONS BELOW

1. United States of America, Plaintiff v. One Eighteenth Century Colombian Monstrance, Known as The Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semiprecious Stones and Pearls, Defendant; Civil Action No. SA-83-CA-2681 (W.D. Tex., San Antonio Division, September 27, 1985).

2. United States of America, Plaintiff-Appellee v. One 18th Century Colombian Monstrance, Known as the Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls, Defendant; James W. Newton, Claimant-Appellant, No. 85-2643 (5th Cir., August 27, 1985) (Reported at 797 F.2d 1370).

3. United States of America, Plaintiff-Appellee v. One 18th Century Colombian Monstrance, Known as the Keeper of the Host of Santa Clara, 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls, Defendant; James W. Newton, Claimant-Appellant, No. 85-2643, On Petition for Rehearing and Suggestion for Rehearing En Banc (5th Cir., October 22, 1986) (Reported at 802 F.2d 837).

STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of the United States has jurisdiction of this Petition for Writ of Certiorari under the provisions of 28 U.S.C. § 1254(1). This Petition seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, rendered on October 22, 1986, which denied Petitioner James W. Newton's Petition for Rehearing. The Court of Appeals had, on August 27, 1986, affirmed the judgment of the District Court of the Western District of Texas denying Newton's standing to pursue his claim in the proceedings for forfeiture of the monstrance, and recognizing the agreed judgment between the United States and the Republic of Colombia, the only other claimant to it.

STATUTES INVOLVED

(See Appendix for quotation of Texts)

1. Fifth Amendment, U. S. Constitution
2. 18 U.S.C. § 545
3. 19 U.S.C. § 1608 (subsequently amended).
4. 19 U.S.C. § 1615 (subsequently amended).
5. Fed. R. Civ. P. (Supp.) C(6).

STATEMENT OF THE CASE

On January 20, 1983, U. S. Customs agents seized from the possession of Petitioner-Claimant James W. Newton an eighteenth century gold monstrance, a religious vessel used to display the communion host. The monstrance, known as the Keeper of the Host of Santa Clara, was made in Colombia by the jeweler to the Royal Court of Spain. It was imported into the United States by Edward Uhart, who has subsequently been indicted, but not tried or convicted, on charges of fraudulent importation.[1]

The United States government filed a suit for forfeiture in the United States District Court, Western District of Texas, which court had jurisdiction under 28 U.S.C. §§ 2345, 1355 and 1395(b). Following an evidentiary hearing, the district court dismissed Newton's claim in the forfeiture proceeding, holding that he lacked standing to contest the forfeiture. The court determined that Newton lacked "an ownership interest" in the monstrance, despite his unequivocal testimony that he had decided to purchase the monstrance himself, rather than see it leave San Antonio, and had personally borrowed two hundred thousand dollars to make the down payment to Uhart. See testimony of James W. Newton, pp. 69-75, appendix. No other witnesses testified. In making the determination, the court looked to the contracts between Uhart and Newton which gave Newton the right to possess the monstrance for a period of a year (later extended), during which time he could look for someone to purchase the monstrance for one million dollars and retain twenty percent of the proceeds of

1. Uhart to date has not returned to the United States to face the crimnial charges.

the sale. The contracts in no sense precluded Newton from electing to make the purchase in his own right and later reselling the monstrance.

Following Newton's dismissal from the case, the United States and Colombia (the only other claimant to the monstrance) entered into an agreed judgment which forfeited the monstrance to the United States. Pursuant to their agreement, the United States then remitted the monstrance to Colombia, denying Newton's claim for remittance. The monstrance was forfeited to the United States on the basis of stipulated evidence, and not in a contested proceeding.[2] The district court rejected Newton's offer of proof contesting the forfeiture since he was no longer a party to the proceeding.

The Fifth Circuit affirmed the court below, holding that Newton lacked standing and had no ownership interest in the monstrance. This decision is in conflict with the general principles of standing set forth by this Court, which hold that the allegations of a complaint are considered, and not that a plaintiff must prove his standing in an evidentiary hearing. Moreover, even if some additional standing requirement in forfeiture proceedings is appropriate, the Fifth Circuit's requirement that a claimant prove an ownership interest in the *res* is directly in conflict with that of the Ninth Circuit, which has expressly held that one in possession of the object at the time of its seizure has standing to file a claim in the forfeiture action, even if he has no ownership interest. *United States v. 1982 Sanger 24' Spectra Boat,*

2. Newton suggests that the judgment and the findings of fact and conclusions of law should be skeptically reviewed, in view of this agreement between the two governments involved. The case was not contested; evidence against the forfeiture was not presented. The court heard no live witnesses except Newton.

738 F.2d 1043, 1046 (9th Cir. 1984). It also conflicts with the holdings and practices of the other circuits.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), this Court indicated that an innocent owner or secured party who was in no way responsible for the illegal act which led to the forfeiture, and who had done all that he could to ensure the lawful use of property has a claim of constitutional dimensions since "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" under such circumstances. *Id.* at 688-90. Newton submits that he is such an owner and that he has been deprived of his property without due process of law in violation of the Fifth Amendment. This claim is further buttressed by the fact that the relation-back doctrine, under which property is forfeited to the United States at the time of the illegal act is inapplicable under 18 U.S.C. § 545, upon which the government relies. Rather, under 18 U.S.C. § 545, a good faith innocent purchaser for value cuts off the right of the government to forfeit the property; the government is relegated to seeking the value of the property from the smuggler. *See United States v. Caldwell*, 49 U.S. (8 How.) 366, 367 (1850).

ARGUMENT

QUESTION ONE

Claimant James W. Newton has standing to contest the forfeiture of the monstrance to the United States government.

A. General Standing Principles

Newton filed a verified claim asserting his interest in the monstrance, and he testified that he bought the mon-

strance from Edward Uhart for his own account, that he borrowed the money to make the down payment, and that he has paid all of the interest and some principal on the note. Testimony of James Newton, pp. 69-75, 86; verified claim of James W. Newton (see appendix).

Even if we assume that the district court correctly held that Newton does not own the monstrance, it does not follow that he lacks standing to contest the forfeiture. Newton had entered into contracts with Uhart which gave him, at a minimum, exclusive possession of the monstrance and the right to sell it. When Newton decided to purchase the monstrance himself, he obtained three guarantors to back his loan. His agreement with the guarantors provided that if the monstrance were resold for a price over one million dollars, the four men would share equally in any proceeds over that sum. Testimony of James Newton, pp. 69-75. Since the monstrance has been appraised at over three million dollars, it is obvious that Newton has a considerable financial stake in the outcome of the forfeiture proceedings. In fact, his financial stake exceeds that of Edward Uhart, the importer of the monstrance.[3]

These allegations are sufficient to demonstrate that he has standing to contest the forfeiture. Newton has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."[4] *Baker v. Carr,* 369 U.S. 186, 204 (1962).

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3. Uhart bought the Monstrance in Colombia for $110,000; Newton had $200,000 at risk.

4. Indeed, the record makes clear that Newton is the only claimant who can demonstrate such concrete adversity; Colombia and the United States have agreed to take the property from Newton

Standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 392 U.S. 83, 99 (1968). The court should look not to the merits of a party's claim, but to the allegations contained in the party's petition. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38-39 (1976) ("[T]he Court held the Constitutional standing requirement under this section to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed"). "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498 (1975).

The courts below, by first addressing Newton's ownership interest and striking his claim, denied Newton the opportunity to contest the government's forfeiture of the monstrance, and possibly persuade the trier of fact that it was not subject to forfeiture. If not subject to forfeiture, the monstrance would have been returned to Newton, leaving the Republic of Colombia to pursue its claim to the monstrance, if any, directly with Newton.

This Court has said:

> "The requirement that a party seeking review must *allege* facts showing that he is himself adversely affected . . . does serve as at least a rough attempt

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and return it to Colombia. Colombia was not required to prove its claim; the U. S. government secured a judgment and findings of fact and conclusions of law containing erroneous but never challenged propositions of U. S. law. Without Newton, there is no controversy. The very purpose of the standing requirement "is closely related to, although more general than, the rule that federal court will not entertain friendly suits . . . or those which are feigned or collusive in nature." *Flast v. Cohen,* 392 U.S. 83, 100 (1968).

> to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

Sierra Club v. Morton, 405 U.S. 727, 740 (1972) (emphasis added).

The administrative provisions of the customs acts do not impose additional requirements. *See* 19 U.S.C. § 1608. That statute provides that "any person" claiming the merchandise may contest the forfeiture upon filing a claim and posting a bond. *Id.; see also* H. Rep. 1156, 98th Cong., 2d Sess. 134 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 5251 (raising the amount of the required bond; "Section 608 allows *any person* claiming an interest in . . . seized . . . merchandise to judicially contest any forfeiture. . . .") (emphasis added). That Congress knew how to, and did in fact impose some unusual provisions in customs administration is shown by 19 U.S.C. § 1615 which provides for a shifting of the burden of proof to the claimant once the government establishes probable cause for forfeiture. 19 U.S.C. § 1615.

Forfeiture is not favored. *United States v. One 1936 Model Ford V-8 Deluxe Coach,* 307 U.S. 219, 226 (1939). Newton has alleged and testified to facts which demonstrate his stake in contesting the forfeiture. This Court should hold that he has the standing to do so.

B. The Requirement of An Ownership Interest

The monstrance was taken from the possession of James Newton. Even if some additional prudential limitation on standing is appropriate in forfeiture cases, a claimant like Newton meets any reasonable requirements. Newton had actual possession of the monstrance; customs agents seized it from him. Newton's verified claim alleges

that he had actual possession of the monstrance and the exclusive right to its possession. Newton testified that he bought the monstrance for his own account. Verified Claim of James W. Newton; Testimony of James Newton (appendix). The contracts with Uhart show that he had the right to possess the monstrance and had a significant financial stake in it.[5]

The Fifth Circuit held:

> "A claimant who asserts standing to contest forfeiture of property used or imported in violation of federal law must establish that he has *an ownership interest* in the property subject to forfeiture. Claimants holding lesser interests in the property cannot prevent forfeitures, but must await the government's acquisition of title and then apply to the Secretary of the Treasury for remission."

United States v. One Colombian Monstrance, 797 F.2d 1370, 1375 (5th Cir. 1986), *reh. denied,* 802 F.2d 837 (opinion below) (emphasis added). "Bare legal title by one who does not exercise dominion and control over the property has been held insufficient to establish ownership." *United States v. One 1978 Piper Navajo PA-31 Aircraft,* 748 F.2d 316, 319 (5th Cir. 1984). This ownership requirement, the Fifth Circuit indicated, is established "to satisfy the case-or-controversy requirement and 'prudential considerations defining and limiting the role of the courts.'" 797 F.2d at 1375 (quoting *Warth v. Seldin,* 422 U.S. at 518).

Nowhere has the Fifth Circuit explained its position that one must be an owner to have standing to contest the

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5. At the time the monstrance was entered into the United States, the customs laws even provided that "[a]ll merchandise imported into the United States shall be held to be the property to whom the same is consigned. . . ." 19 U.S.C. § 1483(1).

forfeiture. In its opinion on Newton's motion for rehearing, the Fifth Circuit held that "mere physical possession is not sufficient to confer standing to contest forfeiture." *United States v. One 18th Century Colombian Monstrance,* 802 F.2d at 838.

No other circuit court has taken such a narrow view of standing to contest a forfeiture. The Ninth Circuit, in *United States v. 1982 Sanger 24' Spectra Boat,* 738 F.2d at 1046 stated:

> "The court was in error if the basis for its ruling was that only the owner of property may be a claimant. In *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) in U.S. Currency,* . . . we held that '(a) "claimant" is one who claims to own the article or merchandise or to have an interest therein.' In *United States v. Jacobsen* . . . the Court stated that under the Fourth Amendment a seizure of property occurs 'when there is some meaningful interference with an individual's possessory interest in that property.' . . . It is not necessary therefore that a claimant under the forfeiture statute allege ownership. *A lesser property interest such as possession creates standing.*

738 F.2d at 1046 (citations omitted) (emphasis added); *see also United States v. One Hundred Twenty-two Thousand Forty-Three Dollars ($122,043.00) in United States Currency,* 792 F.2d 1470, 1473, n.5 (9th Cir. 1986) (collecting cases).

In *United States v. One 1945 Douglas C-54 (DC-4) Aircraft,* 604 F.2d 27, 28 (8th Cir. 1979), *appeal after remand,* 647 F.2d 864 (8th Cir. 1981), *cert. denied sub nom. Stumpff v. United States,* 454 U.S. 1143 (1982), the Eighth Circuit stated:

> "It is the owner or owners of the res who have standing to challenge a forfeiture. . . . Broadly speak-

> ing, *ownership may be defined as having a possessory interest in the res,* with its attendant characteristics of dominion and control."

Id. (citations omitted) (emphasis added). Following remand, the court held that the claimant Stumpff lacked standing since his "ownership" was merely a subterfuge to conceal the illegal activities of the true owner. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft,* 647 F.2d at 866-67. The court rejected the record title in Stumpff's name, and looked to other incidents of ownership: actual possession, control, and financial stake. *Id.* at 866. The court concluded that Stumpff did not exercise dominion and control over the aircraft. *Id.* at 867.

Newton would meet the standing requirements imposed by the Eighth Circuit; he had possession and exercised dominion and control. The monstrance, unlike a car or an airplane, has no record title per se. Although a document was introduced into evidence showing that Uhart had title to the monstrance, Newton testified that he imposed this requirement to help ensure that he obtained clear title to the work. Testimony of James Newton, pp. 126-27. Newton has no bill of sale, but he had not yet paid the full purchase price.

The Eleventh Circuit has stated that "[o]ne must claim an ownership or possessory interest in the property seized." *United States v. Five Hundred Thousand Dollars,* 730 F.2d 1437, 1439 (11th Cir. 1984).

The Tenth Circuit in *dicta* has stated that a claimant must have "a proprietary interest" in the *res. United States v. $3799.00 in United States Currency,* 684 F.2d 674, 678 (10th Cir. 1982). It looked to the claimant's "actual or constructive possession" of the seized currency. *See id.*

In *United States v. United States Currency in the Amount of $2,857.00,* 754 F.2d 208, 212-13 (7th Cir. 1985), the court held as follows:

> "Any claimant of property that is the subject of a judicial condemnation proceeding must file a claim within ten days after the process has been executed or within such additional time as may be allowed by the court, and must file an answer within twenty days after the filing of the claim. See Fed. R. Civ. P., Supp. Rule C(6). The claim 'shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action.' *Id.* Once the procedural requirements of Rule C(6) are met, a claimant has standing to defend the forfeiture."

Newton met these procedural requirements. *See* Fed. R. Civ. P. (Supp.) C(6) ad. comm. note ("The present rule's emphasis on 'the true and bona fide owner' is omitted, since anyone having the right of possession can claim.) (citations omitted).

The other circuits, like the Seventh Circuit, impose no artificial "standing" requirement to being a claimant in a forfeiture action. This Court itself has reached the merits of a forfeiture action without requiring the claimant to prove his "standing". *United States v. One Ford Coupe Automobile,* 272 U.S. 321, 323 (1926) (the auto was "said to belong to Garth Motor Company," the claimant). Newton would meet the standing requirements in every circuit *except* the Fifth Circuit.

Newton respectfully submits that the position taken by the Fifth Circuit is untenable, insupportable and unjust. His petition for writ of certiorari should be granted so that this Court may establish the standing requirements for a forfeiture action.

QUESTION TWO

The holding that claimant James W. Newton lacked standing, combined with the rejection of his petition for remission, and the approval of the agreed judgment between the governments of the United States and the Republic of Colombia deprived James W. Newton of property without due process of law.

This Court, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974), noted that the broad sweep of forfeiture statutes could, in some circumstances, give rise to serious constitutional questions. Where the owner or claimant of the property is unaware of and uninvolved in the illegal activity, and has done everything possible to thwart that activity, it is difficult to conclude that forfeiture serves legitimate purposes and is not unduly oppressive. *See id.* at 689-90; *cf.* 18 U.S.C. § 1963(m); H. Rep. 1030, 98th Cong., Sess. 200-01 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3383-84 (showing Congressional intent to protect innocent purchasers of forfeitable property).

The Court has also addressed the remission process, which at least theoretically provides some protection to the innocent owner whose property is forfeited:

> "An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the forfeiture was incurred without willful negligence or without any intention on the part of the petitioner * * * to violate the law * * *. 19 U.S.C. § 1618. Upon this showing, the Secretary is authorized to return the seized property upon such terms and conditions as he deems reasonable and just. It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent peti-

> tioner's protests have gone unheeded. When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."

United States v. United States Coin and Currency, 401 U.S. 715, 721-22 (1971) (citations omitted).

The district court found that Newton was not involved in the illegal importation (if such in fact occurred). Order dismissing Newton's claim, p.1. The agreed judgment of forfeiture in this case reached between the United States and the Republic of Colombia was predicated and conditioned upon the grant of Colombia's petition for remission, which obviously meant that the United States government would reject, without serious consideration, the claim of James Newton. The government in fact rejected his petition on the grounds that "Mr. Newton has failed to establish that he has a good faith interest in the subject property." Letter from Brad Cates, U.S. Department of Justice, December 13, 1985 (see appendix). He is an innocent protester whose claims have gone unheard and unheeded. He could not have prevented the illegal importation of the monstrance since he did not own it or have any interest in it at the time of importation. *See United States v. One 1976 Chevrolet Corvette,* 477 F. Supp. 32, 35 (E.D. Pa. 1979) (forfeiture from innocent purchaser would constitute an unconstitutional deprivation of property).

The government has argued below and the district court judgment holds that the doctrine of relation-back applies to this forfeiture. *United States v. Stowell,* 133 U.S. 1, ___, 10 S. Ct. 244, 247 (1890). Under this doctrine, the forfeiture takes effect immediately upon the

commission of the illegal act. The Court concludes that third parties, even good faith purchasers, cannot obtain rights superior to those of the government after that time. *See id.*

The relation-back doctrine is, however, not applicable to the statute under which the monstrance was forfeited, 18 U.S.C. § 545. The statute provides in relevant part:

> "Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

Where a statute provides for foreiture either of the goods themselves or of their value, the relation-back doctrine does not apply. *Caldwell v. The United States,* 49 U.S. (8 How.) 366, 379 (1850). This Court held that "under a statute which declares . . . that either the goods, or the value of them, shall be forfeited," title does not pass to the government at the time of the illegal act so as to cut off the rights of subsequent good faith purchasers. Chief Justice Marshall in *The United States v. Grundy and Thornburgh,* 7 U.S. (3 Cranch.) 337, 351 (1806) reached the same conclusion. *See also United States v. York Street Flax Spinning Co.,* Fed. Cas. No. 16781, 17 Blatchf. 138 (1879); *United States v. Four Cases of Lastings,* Fed. Cas. No. 15,145, 10 Ben. 371 (1879).

Under such a statute, "title to the goods remains in the original owner until the government elects whether to demand the goods or their value, and . . . if, before the election is made, the goods are sold to a bona fide purchaser, the title passes by the sale, and the right of the

government to proceed against the goods is gone." *United States v. York Street Flax Spinning Co.,* Fed. Cas. No. 16,781, 17 Blatchf. at 140; *see also National Atlas Elevator Co. v. United States,* 97 F.2d 940, 943 (8th Cir. 1938) (following this principle). Since the legislative history of the amendment of § 545 which permitted the government to seize the value of the goods as well as the goods themselves specifically refers to the *Atlas Elevator* case, Congress obviously knew and intended that the relation-back doctrine should not apply. S. Rep. No. 2326, 83d Cong., 2d Sess. 8 (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 3900, 3907; *see also United States v. Currency Totaling $48,318.08,* 609 F.2d 210, 213 (5th Cir. 1980) (relation-back does not apply to permissive forfeiture statutes).

The government has an alternative remedy against Edward Uhart. It is undisputed that Newton had no part in the illegal importation of the monstrance, and had in fact been given Customs forms correctly describing the country of origin and the nature of the item. The government delayed for ten months after seizure of the property before instituting suit for forfeiture; in fact, Newton himself pushed the government into bringing the forfeiture action by filing suit against the District Director of Customs for return of the monstrance. Delay alone has been held to be a sufficient defense to forfeiture. *See United States v. One 1973 Buick Riveria Automobile,* 560 F.2d 897, 901 (8th Cir. 1977) (citing cases). Newton was held to lack standing to pursue his claim, his petition for remission was denied, and the monstrance was effectively conveyed to Colombia without ever permitting Newton to have an opportunity to be heard on the merits. This course of conduct deprived Newton of his property without due process of law.

CONCLUSION

This Court should review this case because the circuit courts are badly divided on the issue of standing in forfeiture cases, a matter of substantial public concern in view of the increasing number of such actions. In addition, the due process entitlements of innocent third parties in forfeiture proceedings merit this Court's attention. James Newton respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JAMES LUKIN DROUGHT
2400 InterFirst Plaza
San Antonio, Texas 78205
(512) 225-4031

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ONE 18TH CENTURY COLOMBIAN MONSTRANCE Known as the Keeper of the Host of Santa Clara 11.3 Troy Pounds of Gold with Approximately 1,500 Precious and Semi-Precious Stones and Pearls,
Defendant,

JAMES W. NEWTON, Claimant-Appellant.

(Filed August 27, 1986)

Before: Alvin B. Rubin, Henry A. Politz, and Sam D. Johnson, Circuit Judges.

Opinion by Judge Alvin B. Rubin

Appeal from the United States District Court for the Western District of Texas

H. F. Garcia, District Judge, Presiding

SUMMARY

Forfeiture

Appeal from an order dismissing an art dealer's claim to certain property and awarding forfeiture of the property to the United States. Affirmed.

An eighteen century Monstrance (a holy work used by a religious convent during Mass to display the host) was brought into the United States from Colombia by Edward Uhart. Uhart did not obtain the export permit required by Columbian law, and he filed certain certifications with the United States Customs Service that were allegedly fraudulent and misleading. Uhart arranged for Appellant James W. Newton, a San Antonio art dealer, to locate potential buyers for the Monstrance. In exchange for paying Uhart a $200,000 security deposit, Newton had one year in which to sell the Monstrance in Uhart's behalf for $1 million. For successfully completing a sale, Newton would be paid twenty percent of the sale price; if no sale were made, the Monstrance would be returned to Uhart in exchange for the return of the $200,000 deposit. Eventually, U.S. Customs agents seized the Monstrance, and Uhart was indicted for customs violations in connection with the importation of the Monstrance. The United States then filed this action seeking forfeiture of the Monstrance for fraudulent importation. Asserting an "ownership" interest in the Monstrance. Newton filed a claim seeking to challenge the forfeiture. Finding that he lacked standing to contest the forfeiture because he was not the legal or equitable owner of the work, the district court dismissed his claim.

[1] Although Newton contends that the district court erroneously required him to prove that he had an interest in the Monstrance sufficient to satisfy standing requirements before demanding that the United States prove that it had probable cause to seize the Monstrance, standing is a threshold question for entry into a federal court and must be considered by the court even if not raised by the parties. [2] The burden of establishing

standing to contest a forfeiture is on the claimant, [3] who must establish that he has an ownership interest in the property subject to forfeiture. [4] Newton first contends that he must be presumed to be the owner of the Monstrance because he had possession of it at the time it was seized. However, even if he was initially entitled to a presumption of ownership, the government fully rebutted that presumption by evidence that Newton was acting merely as a broker for Uhart. [5] Although Newton contends that he had title to the Monstrance by virtue of certain contracts with Uhart, [6] the documents produced create only a brokerage or consigee relationship. Nothing in the record raises serious doubts about the district court's finding that legal title was retained by Uhart.

[7] Newton's reliance on two cases to support his contention that the term "ownership" as employed for the purpose of adjudging standing to contest forfeiture proceedings should be broader than "title-holder" is misplaced. [8] Those cases involved forfeiture of property used in violation of drug laws and were decided under a different statutory provision. Besides, even if some type of equitable ownership might be sufficient to confer standing to contest forfeiture under the statute dealing with importation of property, Newton has not shown that he possesses any equitable interest in the Monstrance under Texas law. [9] Newton was but a broker or consignee, and his financial stake in the Monstrance was not that of ownership. At most, he had a secured claim or a contingent future interest. [10] As to Newton's final contention that the Uniform Commercial Code as adopted by Texas recognizes the type of transaction

that he and Uhart entered into as a "sale or return" purchase consummated when delivery of the Monstrance was made, "sale or return" purchases of art are specifically exempt from the statute's coverage.

OPINION

ALVIN B. RUBIN, Circuit Judge:

The United States seeks to forfeit property allegedly imported fraudulently by a person who has since become a fugitive from justice. The property was left in the possession of a dealer under a contract giving the dealer the right to sell the property and to retain it until the dealer had been repaid a sum deposited with the owner for that right. The issue in this case is whether the dealer has standing to contest the forfeiture. Because we find that, under the law of Texas, the state in which the contract was made and the property is situated, the dealer is neither the legal nor equitable owner of the property and because the dealer has alleged no other property interest, we affirm the judgment of the district court dismissing his claim and forfeiting the property to the United States.

I.

A long time ago, in the eighteenth century, Don Nicolas de Burgos, a master goldsmith and jeweler to the Royal Court of Spain, traveled to Colombia where, from gold and jewels given by the devout, he made a Monstrance to be used during Mass to display the host for the religious Convent of the Sisters of Santa Clara in Tunja, Colombia. His holy work stands three feet high

and is made of 11.3 troy pounds of gold (melted from 813 gold coins) and 1,500 jewels, including emeralds, pearls, amethysts, diamonds, topaz, and rubies. Its value, fixed by at least one appraisal at $3 million, is enhanced by the fact that the Sisters of Santa Clara and Don Nicholas maintained detailed records recounting how the work was commissioned, the donations collected, and the piece manufactured during the two-year period of its construction.

The Monstrance remained in the possession of the Sisters of Santa Clara for more than 200 years until, in 1978, the Sisters were forced to seek permission from their Archbishop to sell the Monstrance in order to obtain money to repair the roof of the Convent. After the Archbishop authorized the sale, the Sisters offered the Monstrance to the Colombian National Gold Museum in Bogota. Their offer was declined, however, because that museum collects only pre-Colombian Indian art.

What happened thereafter is disputed. The parties to the dispute are Newton, a San Antonio art dealer who claims an interest in the Monstrance, and the governments of the Republic of Colombia and the United States. The two governments contend that, in October, 1978, the nuns sold the Monstrance to Carlos Manzur Aulestia, a Colombian antique dealer, for $31,250 on the condition that the treasure remain in a Colombian museum. Newton contends that Manzur did not buy the Monstrance from the nuns but was retained only to act as their agent for its sale. All parties agree, however, that in 1980, Manzur, acting either for himself or on behalf of the Sisters, offered the Monstrance to Colombia's Gold Museum in Bogota a second time, but the

museum again declined to buy it. The two governments contend that thereafter, in 1981, Manzur, acting as owner, sold the Monstrance to Mr. and Mrs. Joseph Atia for $47,125 and that the Atias resold it to Edward Uhart for $110,000 even before it was delivered to them. Manzur was therefore asked to deliver the Monstrance to Uhart directly.

Newton contends that the Sisters had not sold the treasure either to Manzur or to the Atias but that they sold it directly to Uhart. Because Newton has not been heard on the merits, we take his version of events, although it appears to be immaterial how Uhart came to be in possession, and to claim ownership, of the Monstrance, for all agree that eventually he did buy it and, without obtaining the export permit required by Colombian law, flew with it to New York City in February 1981.

When Uhart arrived in New York, a customs broker acting on his behalf filed a Consumption Entry Packet with the United States Customs Service. The packet, which contained a "bill of sale" from Manzur to Uhart and a certification made by the Sisters of Santa Clara, represented that:

1. The bill of sale was authentic;

2. The bill of sale was a commercial invoice;

3. The information contained in the bill of sale (the date of the sale, the price, and the names of the seller and the buyer) was true and correct and represented an actual transaction;

4. The information contained in the "certification" of the Sisters of Santa Clara (the date of the sale, the

names of the seller and buyer, the presentation to and refusal of purchase by Museum of Gold) was true and correct and represented an actual transaction;

5. The article had been exported from Spain and that the port of lading was Bogota, Spain (rather than Bogota, Colombia); and

6. The article being imported was a "chalice used in religious ceremonies."

Contending that these representations were fraudulent and misleading the United States later filed this forfeiture proceeding.

About one month after he arrived in New York, Uhart telephoned Newton, described the Monstrance, and offered to take it to San Antonio so that Newton might seek a buyer. At first Newton was not interested, but he eventually agreed to locate potential buyers. Newton in turn described the Monstrance to several prominent San Antonio art patrons and suggested that they buy the piece and donate it to the San Antonio Art Museum. Uhart then came to San Antonio and showed the Monstrance to prospective buyers, but no sale agreement was reached at that time.

Shortly thereafter, Uhart left San Antonio with the Monstrance and showed it to collectors in other U.S. cities. Unable to find a buyer, Uhart returned to San Antonio in the summer of 1982 and made a deal with Newton on October 29, 1982. That contract was commemorated in a writing prepared by Newton. The agreement recited that, in exchange for a "confidence deposit" of $200,000 paid to Uhart by Newton or his financial backers, Uhart would place the Monstrance in a San

Antonio bank vault and Newton would be given one year within which to sell the Monstrance in Uhart's behalf for $1 million. For successfully completing the sale, Newton would be paid "twenty percent of sale price with balance to be paid to Edward Uhart." If, at the end of one year, no sale had been made, the Monstrance was to be returned to Uhart in exchange for the return of the $200,000 deposit. If Uhart failed to return the deposit within 60 days after the end of the year, "the Monstrance (was to) become the property of the parties originally extending the two hundred thousand dollars." The agreement also required Uhart to produce "all original documents pertaining to the Monstrance, including those showing proof of purchase, and the legal export import into this country." In compliance with this provision, Uhart produced documentation facially appearing to satisfy these demands.

Newton hoped to obtain the $200,000 security deposit from a new group of prospective buyers, the Guthrie Group, who intended to donate the Monstrance to the San Antonio Art Museum. Due to anticipated unfavorable changes in the tax laws, however, that group abandoned its plans, leaving Newton without a prospective buyer. Newton then decided to put up the $200,000 security deposit himself and, with the aid of guarantees from three associates, borrowed the required amount and delivered the deposit to Uhart.

On December 16, 1982, Uhart and Newton signed a "contract agreement extension," which reiterated Newton's "exclusive right to sell or place" the Monstrance. The extension agreement referred expressly to the October 29, 1982, agreement, and gave Newton the right

to extend that contract for an additional year if he paid—at an unspecified time—an additional $150,000 "confidence deposit."

In mid-November, 1982, Newton showed the Monstrance to Dr. Nancy L. Kelker, Curator of Pre-Colombian and Spanish Colonial Art at the San Antonio Museum of Art, and assured her that Colombian Customs had approved the export of the Monstrance. He also advised her that, although the export requirements were "all taken care of," she should not make any inquires on Colombia regarding the piece and should avoid giving it widespread publicity. This warning aroused Kelker's concern about the legality of the export of the Monstrance so she made inquiries about the work both to George Syage, the Customs broker who had handled the import of the Monstrance into the United States, and to Colombia. Syage told her that the United States Customs office had no copies of any Colombian export documents. The Colombian Museum of Gold later told her that the Monstrance was taken out of Colombia clandestinely. Her concerns thus reinforced, she reported her findings to the United States Customs Service.

Acting on Kelker's report, U.S. Customs agents met Newton at the San Antonio Museum of Art, posing as potential out-of-town purchasers of the Monstrance. After discussing its export with him, the agents identified themselves and seized the Monstrance as evidence of violations of 18 U.S.C. §§ 542 and 2314 (relating, respectively, to entry of goods into the United States by means of false statements and to the transportation of stolen items in foreign commerce). Subsequently, Uhart was indicted for customs violations in connection with his importation of the Monstrance.

The United States then filed this action seeking forfeiture of the Monstrance for fraudulent importation in violation of 18 U.S.C. § 545, the text of which is set forth in the footnote.[1] Uhart cannot be located and is apparently a fugitive from justice. In any event, he has filed no claim challenging the forfeiture. Newton and the Republic of Colombia, however, have filed verified claims seeking to challenge the forfeiture. The United States subsequently asked the district court to strike Newton's claim for lack of standing on the ground that Newton was not the owner of the Monstrance, and the court scheduled an evidentiary hearing on that issue.

At the hearing, Newton asserted an "ownership" interest in the Monstrance, contending that the $200,000 "confidence deposit" represented a down payment on his personal purchase of the work. Newton raised no other kind of claim of interest in the Monstrance and explicitly rejected all alternative characterizations of his interest as "straw men" undeserving of serious consideration. Based on the evidence presented, the district

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1. Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper, or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sell, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . .

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States . . . .

court found that, although Newton was not involved with the alleged illegal importation of the Monstrance, he also was not the legal or equitable owner of the work and, therefore, had not demonstrated an interest in the seized item sufficient to satisfy the court of his standing to contest its forfeiture.

After the dismissal of Newton's claim, the Republic of Colombia agreed to withdraw its claim and to stipulate to facts sufficient to establish probable cause for the seizure and forfeiture of the Monstrance to the United States in exchange for a promise that the United States would return the Monstrance to Colombia after it had been exhibited for three or more months in the San Antonio museum. There being no one left before the court with standing to challenge either the stipulations or the forfeiture, the district court awarded the Monstrance to the United States.

II.

[1] Newton's first contention is that the district court erroneously required him to prove that he possessed an interest in the Monstrance sufficient to satisfy standing requirements before demanding that the United States prove it had probable cause to seize the Monstrance. In support of the proposition he cites the rule set forth at 19 U.S.C. § 1615: "In all suits or actions . . . brought for the forfeiture of any . . . merchandise . . . seized under the provisions of any law relating to . . . the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon the claimant . . . *Provided,* that probable cause shall be first shown for the institution of such suit of

action. . . ." It is, however, elementary that, as a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim[2] In the absence of a party with sufficient interest, the constitutional limitation of federal court jurisdiction to "cases or controversies" would prevent a federal court from considering the matter. Standing, therefore, is literally a threshold question for entry into a federal court, limiting the exercise of its jurisdiction, and the court must consider the standing of any party even if the issue has not been raised by the parties to the action.[3]

[2] This circuit has held that the burden of establishing standing to contest a forfeiture is on the claimant seeking to come before the court.[4] A claimant need not prove the merit of his underlying claim, but he must be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and "prudential considerations defining and limiting the role of the courts."[5]

[3] A claimant who asserts standing to contest forfeiture of property used or imported in violation of federal law must establish that he has an ownership interest

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2. *Worth v. Seldin*, 422 U.S. 490, 517-18, 95 S. Ct. 2197, 2214-15 (1975).

3. *Juidice v. Vail*, 430 U.S. 327, 331-32, 97 S. Ct. 1211, 1215 (1977); *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848 (1969).

4. *United States v. $364,960*, 661 F.2d 319, 326 (5th Cir. 1981); *United States v. $48,318.08*, 609 F.2d 210 (5th Cir. 1980); *United States v. One 1967 Chris Craft, 27 foot Fiber Glass Boat*, 423 F.2d 1293, 1294 (5th Cir. 1970).

5. *Worth v. Seldin*, 422 U.S. at 518, 95 S. Ct. at 2215.

in the property subject to forfeiture.[6] Claimants holding lesser interests in the property cannot prevent forfeiture, but must await the government's acquisition of title and then apply to the Secretary of the Treasury for remission.[7] Although recognizing the general applicability of the ownership requirement, Newton advances three theories to support his standing: first, that, pending trial, he should be presumed to be the owner of the Monstrance; second, clear error in the district court's determination that he did not possess title to the Monstrance under the terms of his contract with Uhart; and third, that the concept of ownership sufficient to establish standing is broader than holding legal title.

A.

[4] To support his position that he must be presumed to be the owner of the Monstrance, Newton cites language borrowed by this Court in *United States v. $364,960 in U.S. Currency*[8] from *United States v. Wrights*[9] " 'seizure of property *from someone* is *prima facie* evidence of the person's entitlement' and . . . a claimant 'need not come forward with additional evidence of ownership' unless there are 'serious reasons (presented by the Government or adverse claimants) to doubt [the claimant's] right

6. *General Finance Corp. of Florida South v. United States*, 333 F.2d 681, 682 (5th Cir. 1964); *United States v. One 1952 Model Ford Sedan Automobile*, 213 F.2d 252, 255 (5th Cir.), *cert. denied*, 348 U.S. 862, 75 S. Ct. 87 (1954); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, *after remand*, 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1984).

7. *See* cases *supra* note 5 and 19 U.S.C. § 1617.

8. 661 F.2d 319, 327 (5th Cir. 1981).

9. 610 F.2d 930, 939 (D.C. Cir. 1979).

to the property seized from him.' "[10] Newton, however, made representations to the United States—both orally and through the production of his contracts with Uhart—that raised serious doubt about whether he had acted as anything other than a broker in Uhart's behalf. The government also produced independent evidence, including the information sent to it by Kelker, to support its contention that Newton was merely a broker seeking to earn a commission on sale. Even if Newton was initially entitled by virtue of his claim to possession of the Monstrance to be presumed its owner, the government fully rebutted that presumption. The trial court, therefore, committed no error in requiring Newton to produce proof of his ownership interest.

B.

[5] Newton's contention that he had title to the Monstrance is founded entirely on rights that he contends he acquired both by paying Uhart a $200,000 "confidence deposit" under the terms of the October 29, 1982, contract and by signing the December 16, 1982, contract extension. He concedes that at the time the October 29, 1982, contract was signed, he was working for a commission and trying to sell the Monstrance to the Guthrie group, but he contends that he tendered the $200,000 "confidence deposit" as a down payment on his own purchase of the Monstrance when the Guthrie group abandoned its plan to buy it. At no time, however, has he produced evidence other than his own testimony indicating that the $200,000 deposit was to serve as a

10. 661 F.2d at 327 (emphasis as it originally appeared in *Wright*).

down payment. Newton's receipt from Uhart merely acknowledges receipt "of the $200,000 deposit" and states that "any rights of James W. Newton Associates" under the October contract "are transferrable and specifically assignable to a commercial bank for the purpose of obtaining the aforementioned deposit funds." The December extension, which was written the same day the confidence deposit was tendered, makes no reference to a sale of the Montrance to Newton. Instead, it merely purports to permit an extension of the existing agreement between Newton on Uhart for an additional year in exchange for an "additional confidence deposit" of $150,000.

[6] A trial court's finding that a claimant is not the owner of property is a finding of fact, conclusive unless clearly erroneous.[11] The documents produced create only a brokerage or consignee relationship between Newton and Uhart in which Uhart remained the owner of the Monstrance and Newton paid him $200,000 in order to retain possession of the work, the right to attempt to negotiate a sale, and the opportunity to earn a commission. Nothing in the record raises serious doubt about the correctness of the district court's finding that legal title to the Monstrance was retained by Uhart.

C.

[7] Newton cites two Fifth Circuit opinions to support his contention that the term "ownership" as employed for the purpose of adjudging standing to contest forfeiture proceedings should be considered broader than

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11. *One 1945 Douglas C-54*, 647 F.2d at 866; Fed. R. Civ. P. 52(a).

"title-holder." In *United States v. $47,875 in U.S. Currency,*[12] this court cited legislative history accompanying the enactment of 21 U.S.C. § 881(a)(b) (a statute different from, although similar to, the statute under which the government acted against Newton) that indicated that "the term 'owner' should be broadly construed to encompass any person with a recognized legal *or equitable* interest in the property seized."[13] He seeks further support from a quotation contained in a string-citation parenthetical in *United States v. $364,960 in U.S. Currency,*[14] which states that the right to intervene in a forfeiture proceeding extends to "any person or party having a legally recognized interest in the [seized item] whether he is owner or lienholder or whether that interest is legal or equitable in nature."[15]

[8] Newton's reliance is misplaced. Both *$47,875* and *$364,960* involved forfeiture under 21 U.S.C. § 881(a)(6) of property used in violation of federal drug laws. In 1978, Congress amended 21 U.S.C. § 881(a)(6) to "expand the government's right of forfeiture in drug cases."[16] In partial mitigation, Congress correspondingly expanded the definition of an "owner" who could contest the forfeiture under the innocent-owner exception contained in § 881(a)(6) to include "any person with a

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12. 746 F.2d 291 (5th Cir. 1984) (emphasis added).

13. *Id.* at 293, *citing* Joint Explanatory Statement of Titles II and III, 1978 U.S. Code Cong. & Ad. News 9496, 9522-23.

14. 661 F.2d 319 (5th Cir. 1981).

15. *Id.* at 326, *citing United States v. One 1961 Cadillac Hardtop Automobile,* 207 F.Supp. 693, 698 (E.D. Tenn. 1962).

16. *United States v. One 1977 Cadillac Coupe de Ville,* 644 F.2d 500, 502 (5th Cir. 1981).

recognizable *legal or equitable* interest in the property seized."[17] Congress, however, has not amended 18 U.S.C. § 545, the statute dealing with importation of property under which this action was brought. Even if some kind of equitable "ownership" might be sufficient to provide standing to contest forfeiture under § 545, Newton has not shown that he possesses any equitable interest in the Monstrance under Texas law.

His sole reliance in contending that he possesses an equitable interest in the Monstrance rests on criteria for determining standing the Eighth Circuit set forth in *One 1945 Douglas C-45*.[18] That case involved a claim of standing to contest a forfeiture under 21 U.S.C. § 881 (a)(4) by a claimant who, although listed on the bill of sale and FAA registration certificate as the owner of a plane, did not exercise sufficient dominion and control over it to be its true owner. The Court of Appeals for the Eighth Circuit, consequently, affirmed the lower court's ruling that the holder of the paper title did not, under the circumstances of that case, possess an ownership interest sufficient to warrant standing to intervene in the forfeiture proceedings. Its discussion of control, possession, and financial stake to determine where the true ownership interest lay is not a basis to conclude that these criteria are each independently sufficient for determining ownership.

[9] Nor is Newton's interest in the Monstrance as strong as that found by the court in *One 1945 Douglas C-45* to vest true ownership in a party lacking paper title.

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17. *$47,875*, 746 F.2d at 293.

18. 647 F.2d at 866.

Newton was but a broker or consignee, and his financial stake in the Monstrance was not that of ownership but, at most, that a secured claim or a *contingent* future interest. The same evidence that has made it clear that Newton does not hold legal title to the Monstrance, thus, is more than sufficient to support a finding that he does not hold equitable title either.

D.

[10] Finally, Newton asserts that § 2.326 of the Uniform Commercial Code, which has been adopted by Texas, recognizes the type of transaction that he and Uhart entered into as a "sale or return" purchase consummated when delivery of the Monstrance was made. Section 2.326 does not purport, however, to define when a "sale or return" purchase has been made. It merely defines the rights that creditors of a party who purchases materials for resale possess in such materials. Even if the § 2.326 were generally applicable to determine when a "sale or return" purchase has been made, it would not apply to a situation like Newton's because "sale or return" purchases of art are specifically exempt from the statute's coverage.[19]

III.

We conclude that Newton has not shown that the district court was in error in its findings of fact or in its application of legal principles to those facts. Newton, therefore, cannot challenge the agreements and stipulations entered into by the United States and Colombia

19. Tex. Bus. & Comm. Code Ann. § 2.326(c)(4) (Vernon 1968, as amended 1977).

following dismissal of his claim. If he had no property right, there is no basis for his charge that forfeiture of the Monstrance denied him his property without due process of law.[20] He must seek other remedies for return of his $200,000 deposit. The order of the district court dismissing Newton's claim and awarding forfeiture of the Monstrance to the United States is, therefore, AFFIRMED.

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20. *General Finance Corp. of Florida South v. United States,* 333 F.2d 681 (5th Cir. 1964); *United States v. One 1952 Model Ford Sedan Automobile,* 213 F.2d 252, 255 (5th Cir.), *cert. denied,* 348 U.S. 862, 75 S. Ct. 87 (1954).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed September 27, 1985)

FINAL JUDGMENT

In accordance with this Court's findings of fact and conclusions of law entered upon the stipulated evidence submitted by the United States and the Republic of Colombia,

IT IS ORDERED and ADJUDGED that the final judgment in the above-captioned matter be, and hereby is, entered in favor of the United States and against the Defendant Colombian Monstrance. The Defendant Colombian Monstrance shall be, and hereby is, forfeited to the United States.

IT IS ALSO ORDERED that in light of the stipulated evidence on the United States' case for probable cause to seize and forfeit this Monstrance, it has not been necessary for the Republic of Colombia to present any evidence on its claim filed in this matter, as such claim is moot if and when the Monstrance is forfeited to the United States and remitted to the Republic of Colombia pursuant to the agreement set forth herein. In the event that this cause is remanded to this Court by any higher Court, or the United States does not grant the petition for remission, as conditioned, then the claim of Colombia shall automatically be reinstated without further order from this Court, so that the Republic of Colombia can participate fully in any and all proceedings of remand and assert without prejudice its claim against the Defendant Monstrance.

IT IS ALSO FURTHER ORDERED that in an effort to limit the length and complexity of the probable cause for forfeiture determination, and to relieve the Court of the necessity to hear and determine the claims of the Republic of Colombia in light of the anticipated mootness thereof, the United States and the Republic of Colombia have presented stipulated evidence to this Court and said stipulated evidence has concerned only those grounds supporting forfeiture of this Monstrance to the United States under Title 18, United States Code, Section 545, premised upon false statements made to the United States Customs Service and other violations of Customs laws and regulations. In the event that any claim comes back to this Court, the United States has expressly reserved its right to put on evidence of other grounds supporting the forfeiture of this Monstrance to the United States, in specific, the cause of action under 18 U.S.C. § 2314, as

pleaded in the alternative pleading contained in the verified complaint for forfeiture filed by the United States in this matter.

IT IS ALSO ORDERED that upon acceptance of the Monstrance by the Republic of Colombia, the Republic of Colombia shall pay to the United States Marshal Service for the Western District of Texas, the custodian of the Monstrance all costs incident to seizure and storage of the Monstrance incurred by the United States Customs Service, the substitute custodian acting on the request of the United States Marshal Service.

IT IS ALSO ORDERED that the execution of this judgment shall be stayed pending the disposition of any appeals taken from this judgment to a higher Court.

IT IS SO ORDERED this the 27th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO: SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff,

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed September 27, 1985)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The United States filed its timely complaint for forfeiture of the above-described Monstrance on December 6, 1983. Thereafter, claims were filed by James W. Newton and the Republic of Colombia. Following an evidentiary hearing on the standing of Mr. Newton to contest the forfeiture, this Court, by previous order, struck Mr. Newton's claim on the ground he lacked standing. On the trial of the merits of this forfeiture cause, conducted on September 23, 1985, the United States of America, Plaintiff, and the Republic of Colombia,

Claimant, presented to this Court certain agreed and stipulated uncontested facts supporting the forfeiture of the above-described Monstrance to the United States. These stipulations concern twenty-three uncontested exhibits and the testimony of the following six witnesses: Customs Agent Gaston Wallace, Dr. Nan Kelker, Mr. Helmuth Naumer, Mr. Gerald Staffel, Mr. Carlos Manzur Aulestia, and Customs Inspector Wilbur Don Ramey. In preparing these findings of fact and conclusions of law, the Court has considered these uncontested facts, the pleadings filed in this matter, and the evidence adduced at the evidentiary hearing on the motion to strike the claim of James Newton since some of that evidence adduced by Mr. Newton related to the probable cause to forfeit this Monstrance.

2. On or about October 1, 1978, Carlos Manzur, a Colombian national, obtained the Monstrance from the Nuns of the Order of Santa Clara in Tunja, Colombia, for 2.5 million Colombian dollars.

3. The transfer of the Monstrance to Mr. Manzur was authorized by the community of nuns and the Archbishop of Tunja.

4. During the month of February, 1981, Mr. Manzur transferred the Monstrance to Mr. and Mrs. Joseph Atia in Bogota, Colombia.

5. On or about February 23, 1981, Mr. Manzur received two checks in payment for the Monstrance from Mrs. Atia. Thereafter, Mrs. Atia told Mr. Manzur that Mr. and Mrs. Atia had already resold the Monstrance to Mr. Eduardo Uhart Alarcon (Eduardo Uhart).

6. Mrs. Atia asked Mr. Manzur to deliver the Monstrance to Mr. Uhart, and he did so on February 23,

1981. Before releasing the Monstrance to Mr. Uhart, Mr. Manzur asked to see a receipt showing that Mr. Uhart was the individual who had purchased the Monstrance from Mr. and Mrs. Atia. Mr. Uhart showed Mr. Manzur a receipt which indicated that he has transferred an amount greater than $110,000 U.S. to Mr. and Mrs. Atia's bank account in New York City.

7. The information contained in the nun's declaration (Exhibit 11), which shows that the nun sold the Monstrance to Mr. Uhart is false and fraudulent.

8. The information contained on the "Manzur Letter" invoice (Exhibit 23), which purports to be signed by Mr. Manzur and which states that Mr. Manzur sold the Monstrance to Mr. Uhart on February 24, 1981, was not written nor signed by Mr. Manzur, and the facts related therein are false and fraudulent.

9. Exhibit 1 is a true and accurate copy of the original Customs Entry Packet also known as the Consumption Entry Packet which contains the documents filed with the United States Customs Service with respect to the importation of this Monstrance into the United States on or about February 24, 1981.

10. The following material misrepresentations are made on paper and invoices submitted in connection with the entry of this Monstrance into the United States and contained within the official Consumption Entry Packet:

a. That the "Manzur Letter" was authentic.

b. That the "Manzur Letter" was a commercial invoice.

c. That the information on the "Manzur Letter" (date of sale, price, seller, buyer) was true and correct and represented an actual transaction.

d. That the information on the convent declaration (date of sale, seller, buyer, presentation to Museum of Gold, first refusal by Museum of Gold) was true and correct and represented an actual transaction.

e. That the article was being exported from "Spain" having being made by Nicholas of Burgos, the King's jeweler in Spain.

f. That the article imported was a "chalice used in religious ceremonies."

g. That there were no other invoices, documents, or other information evidencing the sale other than the documents and information submitted and that immediately upon the receipt of such invoices, documents, or information the importer would submit the same to United States Customs Service.

11. Agent Gaston Wallace and Agent Kenneth Brumfield met with Mr. James Newton on January 20, 1983, at the San Antonio Museum of Art (SAMA) posing as potential out-of-town purchasers of the Monstrance who would buy the Monstrance for a wealthy family's private collection and would take the Monstrance away from San Antonio. During that meeting, Mr. Newton made the following statements:

a. Eduardo Uhart was the owner of the Monstrance and Mr. Newton was a broker acting on his behalf.

b. Under no circumstances should Agent Wallace contact anyone from Colombia about the Monstrance.

that there was no written export license from Colombia but that everything had been "taken care of."

12. During the agents' meeting with Mr. Newton, Mr. Newton showed the agents a packet of documents which included a Customs Form 7501 and the nun's declaration. Exhibit 2 is a true and correct copy of the original packet of documents presented by Mr. Newton to the agents in connection with their purchase of the Monstrance. The *pro forma* invoice contained in the Customs official consumption entry (Exhibit 1) lists the country of origin of the Monstrance was "Spain" whereas the copy of the *pro forma* invoice included in the sale packet (Exhibit 2) does not contain any reference to the country of origin.

13. Before meeting with Mr. Newton on January 20, 1983, the United States Customs agents did investigate the contents of the official Consumption Entry Packet that had been filed with respect to the entry of this Monstrance into the United States. The Customs Form 7501 contained in the official Consumption Entry Packet, Exhibit 1, describes the object imported as an "antique," states that the country of origin of the Monstrance and the country of exportation of the Monstrance is "Spain," the port-of-lading of the Monstrance is "Bogota, Spain" and the value of the Monstrance was $100,000. But, the Customs Form 7501, included in the sales packet and shown to the agents by Mr. Newton on January 20, 1983, described the object imported as an "antique Monstrance," showed the country of origin and the country of exportation of the Monstrance as "Colombia," the port-of-lading of the Monstrance as "Bogota, Colombia" and no value was listed on the form.

14. Before meeting with Mr. Newton on January 20, 1983, the Customs agents also met with certain representatives of SAMA who referred to the United States Customs Service the results of certain investigations that they had conducted on the Monstrance. Specifically, the Customs agents met with Dr. Nan Kelker, then an assistant curator of SAMA, who at the express direction of her superiors, had researched the following questions concerning the Monstrance, pursuant to the "Collection Policy" of SAMA: the authenticity of the Monstrance, and the lawful export of the Monstrance from Colombia, the lawful import of the Monstrance into the United States. Dr. Kelker related the following facts to the United States Customs Service:

a. As evidence of lawful import into the United States, Mr. Newton had showed Dr. Kelker a Customs Form 7501 which showed that the antique Monstrance had been exported from Colombia to the United States.

b. Mr. Newton had told Dr. Kelker that authentic export licensing documents from Colombia were on file with George Syage, the customhouse broker who handled the import of the Monstrance into the United States, that she could telephone George Syage herself in order to ask about the forms, that George Syage was expecting her telephone call, and that Dr. Kelker did telephone the Syage brokerage but they did not know Mr. Newton and did not have copies of any Colombian export documents.

c. Dr. Kelker did write to the Colombian Museum of Gold in Bogota, Colombia, in order to inquire about the legitimacy of the Monstrance and was informed by return letter from the Director of the Museum of Gold

that the Monstrance was "taken out of the country clandestinely."

d. When Dr. Kelker asked Mr. Newton about whether or not Colombian customs had approved the export of the Monstrance, Mr. Newton had told Dr. Kelker that it was "all taken care of," but that she shouldn't ask any questions in Colombia, and when the Monstrance was displayed at SAMA, that SAMA should not publicize the Monstrance nationally.

15. Mr. Uhart, the importer of record of the Monstrance, has been convicted of fraud in the Federal Republic of Germany, swindling in Switzerland, and is a fugitive on an arrest warrant issued on an indictment returned by the United States Grand Jury for the Western District of Texas, and is a fugitive on an arrest warrant issued in Colombia.

16. The Monstrance was made in "Colombia" and, therefore, its country of origin is "Colombia" and not "Spain."

17. The Monstrance was imported from Colombia and, therefore, its country of exportation is "Colombia" and not "Spain."

18. The Monstrance left Colombia at Bogota, Colombia, and therefore, the port-of-lading is "Bogota, Colombia," and not "Bogota, Spain."

19. The value of the Monstrance at the time of its importation into the United States was not equal to $100,000 U.S. as indicated in the "Manzur Letter."

20. The Monstrance is not a chalice imported for use in religious ceremonies, but rather, is a Monstrance that was imported into the United States for re-sale.

21. Mr. Uhart did receive the Monstrance from Mr. and Mrs. Atia and not the nuns in Tunja, Colombia. At the time of the importation of this Monstrance into the United States, Mr. Atia was wanted on an arrest warrant lodged with Interpol and Mrs. Atia was wanted for questioning.

Any finding of fact which may properly be deemed to be a conclusion of law may be so considered as a conclusion of law.

Conclusions of Law

1. A forfeiture proceeding is an in rem action brought against seized property on the ground that the property was used illegally. 19 U.S.C. § 1615. *United States v. $364,960,* 661 F.2d 319, 323 (5th Cir. 1981); *One Lot of Emerald Cut Stones v. United States,* ____U.S.____, 93 S. Ct. 489 (1972); *United States v. One 1978 Mercedes-Benz,* 711 F.2d 1297 (5th Cir. 1983). This Court has jurisdiction over this cause under 28 U.S.C. § 1345 and § 1355, and 28 U.S.C. § 1395(b).

2. The United States bears the initial burden of proof as it must show probable cause for institution of the forfeiture suit. Probable cause is defined as reasonable ground for the belief that the property was used illegally. 19 U.S.C. § 1615. "Reasonable ground for belief," in turn, is supported by less than a "prima facie case but more than the mere suspicion." *Bush v. United States,* 389 F.2d 485, 489 (5th Cir. 1968).

3. The question of whether probable cause exists as a legal question for the Court to determine *Buckley v. United States,* 45 U.S. 251 (1846); *Taylor v. United States,* 44 U.S. 197 (1845). The Court may consider

hearsay evidence (*Bush v. United States, supra*), inferences and circumstantial evidence (*United States v. $364,960, supra*).

4. The United States had probable cause to seize the Defendant Monstrance and institute the forfeiture suit under 18 U.S.C. § 545, paragraph (1) and paragraph (5). Under Section 545, paragraph (1), the United States is required to prove and did prove by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, did knowingly and willfully make out or attempt to pass through customs a false or forged or fraudulent invoice or other document or paper with intent to defraud the United States. The "Manzur Letter," the nun's declaration, and the false representations contained on the Customs Form 7501 and pro forma invoice submitted to Customs in connection with the entry of the Monstrance were either forged or contained false or fraudulent information. Mr. Uhart attempted to pass these false and fraudulent papers through United States Customs with the requisite intent to defraud the Customs laws. The United States' proof of a violation of Section 545, paragraph (1) established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

5. The United States had probable cause to seize the Defendant Monstrance and institute this forfeiture suit under 18 U.S.C. § 545, paragraph (2) and paragraph (5). Under Section 545, paragraph (2), the United States is required to show and did prove by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, fraudulently or knowingly imported the Monstrance into the United States contrary to law. The predicate offenses for the "contrary

to law" provision of Section 545, paragraph (2), in this instance, can be Title 18, United States Code, Section 1001, or Title 18, United States Code, Section 542, or Title 19, United States Code, Section 1484, or Title 19, United States Code, Section 1485.

To support forfeiture under Title 18, United States Code, Section 1001, the United States is required to prove and did prove, by a preponderance of the evidence, probable cause to believe that Mr. Uhart did submit to the United States Customs Service, a department or agency of the United States, a false writing or document knowing the same to contain false, fictitious or fraudulent information relating to the origin of the Monstrance, its value, the purchaser of the Monstrance, the seller of the Monstrance, and the date of the sale transaction, all matters within the jurisdiction of the United States Customs Service in entering merchandise into the United States and all matters with the capability of affecting the exercise of that Governmental function. The United States' proof of a violation of Section 1001 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

To support forfeiture under Title 18, United States Code, Section 542, the United States is required to prove and did prove, by a preponderance of the evidence probable cause to believe that Mr. Uhart, the importer of record, did enter or introduce or attempt to enter or introduce to the commerce of the United States the Monstrance by means of a false invoice and paper and made a false statement in a declaration to Customs as contained in the official Consumption Entry Packet without reasonable cause to believe in the truth of those statements, said statements concerning the origin of the Monstrance,

its value, the purchaser of the Monstrance, the seller of the Monstrance, and the date of the sale transaction. The United States' proof of a violation of Section 542 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

To support forfeiture under Title 19, United States Code, Sections 1484 and 1485, the United States is required to prove and did prove, by a preponderance of the evidence, probable cause to believe that Mr. Uhart, the importer of record of the Monstrance, did breach the statutory duty under Sections 1484 and 1485 to present true, unforged, and correct invoices and documents in respect to his Customs entry of the Monstrance into the United States. The United States' proof of a violation of Sections 1484 and 1485 established the necessary prerequisite for forfeiture under Section 545, paragraph (5).

6. The falsehoods and misrepresentations contained in the papers submitted in connection with the Customs entry of this Monstrance, as contained in Exhibit 1, had the following material effect on Customs processing of this entry:

a. The presence of the "Manzur Letter" represented as a commercial invoice on the Customs Form 7501 affected the entry processing of this Monstrance on the basis of the transaction value of the Monstrance and the prompt liquidation of the entry at the transaction value;

b. The "Manzur Letter" represented as a commercial invoice showing the purchase price of the Monstrance to be $100,000 U.S. affected Customs' duty to appraise merchandise prior to entry, even if the merchandise would be entered duty-free;

c. The inclusion of the nun's declaration had the capability of influencing a Customs officer not to question the entry;

d. The description of the Monstrance as a "chalice used in religious ceremonies" had the capability of influencing a Customs officer to admit the Monstrance, a duty-free antique, as a duty-free religious object, since if the Monstrance appeared to be entitled to two duty-free classifications under the Tariff Schedules, in-depth investigation into facts surrounding entry would be discouraged;

e. The listing of the country of origin of the Monstrance as Spain, the country of exportation of the Monstrance as Spain, the port-of-lading of the Monstrance as Bogota, Spain, and the maker of the Monstrance as "Nicholas of Burgos, the *King's* jeweler," had the natural effect and capability of preventing and discouraging any inquires by United States Customs Officers in the country of Colombia;

f. The elimination of the Atias' from the chain of title on the Monstrance had the natural effect of preventing the Customs officers from investigating into the Atias' background and learning of the existing warrant;

g. The mis-statements, falsehoods, and fraudulent statements contained in the invoice and documents filed with the United States Customs in connection with the entry of this Monstrance adversely affected Customs' duty to collect statistics on exports and to forward accurate information to the United States Census Bureau, as it is required to do so by law;

h. The underrevaluation of the Monstrance on the "Manzur Letter," the commercial invoice submitted by the importer in connection with the importation of this Monstrance, had the natural effect of tending to distort the bonding requirements and liquidated damages stipulated in Customs bonds, as the lower the value of the imported merchandise on the invoice, the lower any subsequently assessed penalties would be.

7. The false "Manzur Letter," the false information contained on the nun's declaration, the false statements with respect to the country of origin, the value and the description of the Monstrance, are each a material misrepresentation because each is an act or omission capable of influencing a decision which United States Customs made in connection with entry of this merchandise.

8. The United States Customs agents needed no warrant prior to seizing this Monstrance on January 20, 1983, because the agents had probable cause to seize the Monstrance at the culmination of their meeting with Mr. Newton. The agents had probable cause to believe that the Monstrance had been imported in the United States in violation of Title 18, United States Code, Section 542 and Section 2314, and further, the Monstrance was seizable as evidence of other violations of United States law including Title 18, United States Code, Section 545 and Title 18, United States Code, Section 1001. The probable cause to seize and forfeit the Monstrance on January 20, 1983, was based on statements made by Mr. Newton to the Customs agents on January 20, 1983, on information communicated to United States Customs by Dr. Kelker prior to seizure,

on the agents' assessment of Mr. Newton's demeanor, on the agents' comparison of Customs papers shown by Mr. Newton to them on January 20, 1983, and their own knowledge of the contents of the Customs Form 7501 contained within the official Consumption Entry Packet filed with United States Customs.

9. Once probable cause is found to exist, the burden shifts to any claimant to show by a preponderance of the evidence that the property was neither used or intended to be used illegally. Title 19, United States Code, Section 1615. *Wood v. United States,* 410 S. Ct. 342 (1842). To contest a forfeiture action as a claimant, a claimant must first demonstrate an interest in the seized property sufficient to satisfy the Court of his standing as a claimant. *United States v. $364,960,* 661 F.2d 319, 326 (5th Cir. 1981).

10. In this case, the Republic of Colombia has elected not to present any evidence on its claim filed in this matter, as its claim is moot if and when the Monstrance is forfeited to the United States and remitted to the Republic of Colombia by the United States, as conditioned. In the event that this cause is remanded to this Court by any higher Court, then the claim of Colombia shall automatically be reinstated without further order of this Court so that the Republic of Colombia can participate fully in any and all proceedings on remand.

11. Title 18, United States Code, Section 545 is a mandatory forfeiture statutory, in that it provides that property "shall" be forfeited to the United States upon the commission of the unlawful act giving rise to forfeiture. *United States v. $48,318.08,* 609 F.2d 210 (5th Cir. 1980).

12. In the case of mandatory forfeiture statutory such as Title 18, United States Code, Section 545, the forfeiture relates back to the time of the illegal act that rendered the property forfeitable. *United States v. Stowell,* 133 U.S. 1 (1890); *United States v. 1967 Chris Craft 27-foot Fiberglass Boat,* 423 F.2d 1293, 1294 (5th Cir. 1970). Under the relation-back doctrine, interests in property which are acquired after the illegal act giving rise to the forfeiture are cut off. *United States v. One Piece of Real Estate,* 57 F.Supp. 723, 725 (W.D. Tex. 1983); *United States v. 1967 Chris Craft, supra,* 423 F.2d at 1294.

13. Under the allegations made by Claimant Newton in his own pleadings in this matter, Mr. Newton did not acquire any interest in the Monstrance until *after* the importation of the Monstrance into the United States, and therefore, the doctrine of relation back cuts off that interest.

14. The fact that there may have been no loss of revenue in the Monstrance's importation into the United States is no defense to a Section 545 forfeiture. *United States v. Kurfess,* 426 F.2d 1017 (7th Cir.), *cert. denied,* 400 U.S. 830 (1970). Thus, the fact that the Defendant Monstrance was imported "duty-free" into the United States is not a defense to the forfeiture of the Monstrance to the United States.

15. Declaration of an item at Customs is no defense to forfeiture under Title 18, United States Code, Section 545. *United States v. Kurfess, supra,* 426 F.2d at 1019. Thus, the fact that the importer of record of this Monstrance may have declared the Monstrance to Customs does not prevent the forfeiture of the Monstrance to the United States.

16. The probable cause proof presented to this Court by way of stipulated proof agreed to between the remaining parties to this lawsuit has concerned only those grounds supporting forfeiture of this Monstrance to the United States under Title 18, United States Code, Section 545 premised upon false statements made to the United States Customs Service and other violations of Customs laws and regulations. In the event that any claim comes back to this Court, the United States has expressed and reserved its right to put on evidence of other grounds supporting forfeiture of this Monstrance to the United States, as indicated in the alternative pleading contained in the verified claim for forfeiture.

17. The Defendant Monstrance is subject to seizure and forfeiture under Title 18, United States Code, Section 545, Title 18, United States Code, Section 542, Title 18, United States Code, Section 1001, Title 19, United States Code, Section 1484, Title 19, United States Code, Section 1485, and the United States is entitled to a judgment of forfeiture.

18. The execution of the judgment of forfeiture shall be stayed pending final disposition of any and all appeals taken from this judgment.

Any conclusion of law which properly may be deemed to be a finding of fact may be so considered as a finding of fact.

ENTERED this the 27th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CAUSE NO. SA-83-CA-2681

UNITED STATES OF AMERICA
Plaintiff

v.

ONE EIGHTEENTH CENTURY
COLOMBIAN MONSTRANCE
Defendant

(Filed September 13, 1985)

ORDER

At issue is the government's motion to strike the claim of James W. Newton. The motion was originally denied based upon this Court's belief that evidence was necessary to support the government's allegations. Upon a request for reconsideration, an evidentiary hearing was held to determine Newton's standing to contest the forfeiture of the monstrance. Having considered the pleadings, the evidence and the argument of counsel, the Court is of the opinion the motion to strike should be granted.

The facts are that sometime in 1980, Newton was contacted by Edward Uhart to advise him the monstrance would be on the market. Newton is an art dealer, among other things, and Uhart owned an art gallery in Barcelona, Spain. The men had engaged in previous dealings with each other including the sale of a painting, and other

trades. After Uhart described the monstrance, Newton told him that he was not interested in it.

The monstrance was brought into the United States on February 24, 1981, without the knowledge or assistance of Newton. Within a month, Uhart again contacted Newton asking him to reconsider the piece. Uhart wanted to sell the monstrance. Though Newton again expressed a lack of interest, further persuasion by Uhart resulted in Newton's agreement to examine the monstrance. When he saw it, he was impressed. He contacted several persons who examined it.

Approximately three months later, Uhart contacted Newton wanting him to find someone who would acquire the piece for donation to the San Antonio Museum of Art. Several investors, the Guthrie group, heard about the monstrance and called Newton. On October 27, 1982, they executed a letter to Newton evidencing their intent to purchase the monstrance and to deposit $200,000 in escrow to show their good faith. Two days later, Uhart and Newton entered into an agreement providing that Newton would be the sole representative for Uhart regarding the exclusive right for the sale and placement of the monstrance, for a period of one year. When the Guthrie group purchase fell through, Newton arranged to pay the $200,000 himself as a confidence deposit. In December, 1982, Uhart and Newton entered into a contract extension agreement providing for additional time to consummate placement of the monstrance. An additional confidence deposit of $150,000 was to be paid by Newton. Approximately one month later, the monstrance was seized by custom's agents from Newton at the San Antonio Museum of Art. Uhart has been indicted for

smuggling violations arising out of the importation of the monstrance into the United States. He is currently a fugitive.

The government contends that Newton had no ownership interest in the monstrance and, thus, lacks standing to contest its forfeiture. Newton concedes that he was working for a commission at the time the Guthrie group sought the purchase, but that the contract extension agreement was intended to make him the owner. Before a person may challenge a forfeiture of money or property, he must first demonstrate an interest in the seized item sufficient to satisfy the Court of his standing to contest the forfeiture. *United States v. $364,960.00 in U.S. Currency,* 661 F.2d 319, 326 (5th Cir. 1981). It is well established that only an owner has such an interest. *General Finance Corp. of Florida South v. United States,* 333 F.2d 681, 682 (5th Cir. 1964). A sufficient ownership interest may be evidenced in a number of ways, including showings of actual possession, control, title and financial stake. *United States v. One 1945 Douglas C-54 Aircraft,* 647 F.2d 864, 866 (8th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). When title to the seized property cannot be determined, either because of the nature of the property (such as money) or lack of proof of ownership, seizure of property from a person's possession is prima facie evidence of that person's entitlement to it. *United States v. Wright,* 610 F.2d 930, 939 (D.C. Cir. 1979). Unless there are serious reasons to doubt a person's right to such property, he need not come forward with additional evidence of ownership. *Ibid.* In this case, Newton was in possession and control of the monstrance at the time of seizure. This is not a situation, however, with no definitive indications of ownership. All of the evidence

is consistent with the conclusions that Uhart was the owner of the monstrance, and that Newton was merely his broker or consignee.

Newton disclaimed any interest in the monstrance on two occasions and denied involvement in its importation. The contact with the Guthrie group resulted from Uhart's desire to have Newton locate a buyer for the monstrance. As conceded by Newton, he was not a member of that group, and his sole interest in the sale was the receipt of a commission. The sale would be between Uhart and the Guthrie group. The October 29th contract, drafted by Newton, clearly reflects these arrangements. Despite Newton's assertions, the contract extension agreement, also drafted by Newton, did not alter his position as broker. Once the Guthrie group plan fell through, Newton himself paid the $200,000 confidence deposit to retain his right to act as Uhart's sole representative to sell the monstrance. In view of the fact that the piece had been appraised at three million dollars, it is rational to believe Uhart wanted some financial security for his interest before relinquishing possession of the monstrance to Newton.

The extension agreement nowhere indicates that Newton was to buy the monstrance. It merely provided for an extension of the original contract and payment of another confidence deposit as additional security. The extension agreement again refers to Newton's "exclusive right to sell or place" the monstrance, and recites that all terms of the original contract are to remain in full force and effect. It further provides as did the original contract, that Newton would receive twenty percent of the sales price. The certificate of Uhart, attached to the extension agreement,

certifies that he is the sole owner of the monstrance. *If* the monstrance was not sold within the extended period and *if* Uhart did not refund the confidence deposits to Newton, *then* the monstrance would become Newton's property. Though Newton concedes he has spoken with Uhart several times since the seizure and could have requested a refund of his deposits, he has not done so. Nothing in Uhart's letter of November 25, 1983 to Newton alters the Court's construction of the extension agreement.

Newton is an intelligent man and chose not to consult an attorney to draft the contracts. His testimony establishes that the first contract meant what it said. Both agreements are consistent with one another as they pertain to Newton's relationship to Uhart and the monstrance. Had Newton wanted to own the monstrance, he could easily have drafted an agreement reciting that he was to buy the monstrance from Uhart. The extension agreement does no more than allow Newton to continue as Uhart's broker. The provision for "forfeiture" of the monstrance to Newton upon the occurrence of certain conditions does not create an ownership interest. The facts revealed that Newton never requested and Uhart never refused to refund the deposits. Additionally, Uhart's letter in November, 1983, created an indefinite extension of the contract. The time for return of the deposits by Uhart has not yet, therefore, passed.

Newton has argued the applicability of Section 2.326 of the Uniform Commercial Code in support of his claim to title. Initially, it should be noted that provision concerns the rights of creditors of the person to whom goods are delivered for sale. Title to such goods vest in the person to whom the goods are delivered. Since the govern-

ment is proceeding against the monstrance, and not against Newton as one of his creditors, the applicability of Section 2.326 is doubtful. Assuming it does otherwise apply, delivery of works of art is excepted according to subsection (c).

The government has also sought to strike Newton's claim based upon a decision in *United States v. Stowell,* 133 U.S. 1, 10 S. Ct. 244, 33 L.Ed. 555 (1890). *Stowell* stands for the proposition that forfeiture occurs, and relates back to, the moment of illegal use, precluding a third person from acquiring a legally recognizable interest in the property after the illegal use. The Court agrees with Newton that until a forfeitable event has been shown, the *Stowell* doctrine should not be applied. *See, e.g., United States v. Currency Totalling $48,318.00,* 609 F.2d 210 (5th Cir. 1980).

The Court concludes that Newton was not the owner of the monstrance and that his interest in it, therefore, was not sufficient to justify his standing to contest the forfeiture. The government's motion to strike shall be granted.

It is therefore, ORDERED that the claim of James W. Newton to the monstrance be, and it hereby is, STRICKEN.

SIGNED this 13th day of September, 1985.

/s/ H. F. GARCIA
H. F. Garcia
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

D.C. Docket No. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ONE 18th CENTURY COLOMBIAN MONSTRANCE KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant,

JAMES W. NEWTON,
Claimant-Appellant.

(Filed November 5, 1986)

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that claimant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 27, 1986

ISSUED AS MANDATE: November 3, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2643

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

ONE 18th CENTURY COLOMBIAN MONSTRANCE KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS.
Defendant,

JAMES W. NEWTON,
Claimant-Appellant.

(Filed October 22, 1986)

Before: Alvin B. Rubin, Henry A. Politz, and Sam D. Johnson, Circuit Judges.

Per Curiam

Appeal from the United States District Court for the Western District of Texas

H. F. Garcia, District Judge, Presiding

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 27, 1986, 5 Cir., ____F.2d____)

OPINION

PER CURIAM:

In Newton's petition for rehearing, he takes the position that he is entitled to require, or that the district court must sua sponte require, the Government to demonstrate probable cause for the forfeiture before examining his standing to raise that question. This puts the cart before the horse. In order to contest the forfeiture of the Monstrance to the United States under 18 U.S.C. § 545, Newton must first establish that he has standing. There is no case or controversy, in the constitutional sense, absent a dispute between parties who have a real interest in its resolution.[1] Even assuming, as the panel did, that Newton made his contract concerning the Monstrance innocently and in complete good faith, to establish standing, Newton must show at least a facially colorable claim to an ownership interest in the work.

Newton continues to insist that he possesses either a legal or an equitable ownership interest in the Monstrance or some sort of right arising out of physical possession that accords him standing. As we held in our previous decision, however, Newton has been unable to establish a facially colorable ownership interest of either a legal or equitable nature and mere physical possession is not sufficient to confer standing to contest forfeiture. Any presumption of ownership he enjoyed due to the fact that the Monstrance was seized from his possession was overcome by the clear meaning of the contracts he and Uhart

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1. *Allen v. Wright*, __U.S.__, 104 S. Ct. 3315, 3324-25 (1984); *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 226, 94 S. Ct. 2925. 2934-35 (1974); *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962).

signed. Newton's own representations about his dealings with Uhart and his efforts to locate a buyer, and the evidence and explanation proffered by the Government as the basis of its decision to seize the work. The face of the relevant legal documents and the versions of the facts offered by every interested party show that Newton was acting solely as Uhart's broker. Only Newton's bald assertion of ownership, which is unaccompanied by factual allegations sufficient to raise serious question about the intent expressed on the face of the contracts, suggests otherwise. No reasonable person could conclude on the basis of the undisputed facts and Newton's representation of the disputed, objective facts that a sale of the Monstrance to Newton was consummated or intended. Finally, because we found that Newton did not possess even an equitable ownership interest in the Monstrance, we refrained in our earlier opinion, as we do now, from deciding whether such an interest would, if established, confer standing.

The Petition for Rehearing is DENIED, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX B

UNITED STATES CONSTITUTION

AMENDMENT V

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUTES

18 U.S.C. § 545

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

19 U.S.C. § 1608

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1615

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant:

Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying mechandise[1] or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

1. So in original. Probably should read "merchandise".

FEDERAL RULES OF CIVIL PROCEDURE

Supplemental Rule C(6)

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

APPENDIX C

EXCERPT FROM THE TESTIMONY OF
JAMES W. NEWTON
BEFORE THE HONORABLE H. F. "HIPPO" GARICA

September 6, 1985

* * *

[69]

and this letter was sent to me on pieces of their interviews or conversations with the director Helmuth Nowner of the San Antonio Museum Association. So, I assumed that probably Mr. Staffel drew this up. I really don't know.

Q. All right.

So, you got these two agreements in late October of '82, and let me ask you now; did the Guthrie group consummate the purchase of the monstrance as contemplated by the October agreement?

A. No, they did not.

Q. Why not, sir?

A. They called me and told me that there were things in the tax laws that were anticipated changes insofar as donations of art objects were concerned.

Q. Uh-huh.

A. And they really needed to research that somewhat more before trying to get a group together to donate this. They were doing this on the basis of a tax advantage.

Q. Was it your understanding that there had been some tax law changes?

A. No, sir.

Q. Okay.

A. What they stated was that not had the tax laws been changed, but they were being re-evaluated, and that possibly the museum procedure or the procedure for giving gifts to museums on a tax

[70]

basis might be changed.

Q. Okay.

Were they able, therefore, to consummate the agreement within the ten day period or thirty day period that is in this letter?

A. No, sir.

Q. Okay.

Now, when you were advised of that, Mr. Newton, what reaction did you have concerning this monstrance and its—and the continuing interest that you may have in it?

A. Well, I understood that if the Guthrie group could not comply with putting up the $200,000 that it required, and if they were not able to consummate the prescribed terms within the period of time, of course, we might lose the monstrance here in the community.

Q. All right.

Now, did the Guthrie group ever put up their $200,000?

A. No, sir.

Q. Okay.

Did they ever put up any money?

A. No, they did not.

Q. All right.

Were you fearful that it might be lost at that point because there was no viable purchaser in the community?

A. Yes, this was the agreement with Mr. Uhart and it had not

[71]

been complied with. And, of course, he could take the piece back and we could lose it all together.

Q. Well, what did you do to try to avoid that contingency, that is the loss of the monstrance?

A. Well, I spoke with several people further stating what the dilemma was and that I was going to need to return the piece if something was not worked out where a purchase agreement or purchase of the piece could be consummated.

Q. Who did you talk to—did you look for some financial help at that time?

A. Well, I had hoped to find someone else who could possibly purchase it or donate it or use the same plan that the Guthrie group had proposed. I did speak to several friends about this, and their comment was, "Why don't you do it yourself?"

Q. Did you do it yourself?

A. I did.

Q. And did you pay $200,000?

A. I did.

Q. Now, had you ever in your life made a loan that large before for anything?

A. Nothing that large; no, sir.

Q. Did you have the cash available?

A. No, I did not.

Q. Did you need help in order to raise the $200,000?

A. I did.

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Q. And how did you raise the $200,000, Mr. Newton, to put down on the monstrance?

A. There were three gentlemen who were friends of mine. Who, the same ones, had suggested that I do this myself—buy the piece and make arrangements to extend it as a donation. They came forward and agreed to be co-signers in a note if I wished to proceed.

Q. All right.

If I may, your Honor, approach the witness, hand the witness what I am marking Defendant's Exhibit F—

THE COURT: Yes, you may.

MR. WHEATLEY: And ask you, sir, if this is a copy of the agreement of December 8 of '82 with the gentlemen you mentioned?

A. Yes, sir; that is the original agreement.

Q. Now, what was the purpose of that agreement made on December 8, 1982, with Messrs. Atwell, Hopkins, and McGrath?

A. Well, the purpose was to assist me in getting a loan so I could proceed with the purchase of the monstrance and within the prescribed period of time and try to work out the same situation where we could sell shares or work something out to give this piece to the San Antonio museum.

Q. All right.

Your Honor, we move the admission into evidence of Defendant's Exhibit F.

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MS. MATHY: May I see it, please?

MR. WHEATLEY: Certainly. Here is the copy and you are welcome to inspect the original.

MS. MATHY: No objections.

MR. TAYLOR: No objections.

THE COURT: Will be received into evidence.

(Defendant's Exhibit F admitted)

MR. WHEATLEY: Now, let's look at this agreement for a moment, Mr. Newton.

First of all, was Mr. Atwell and Hopkins and McGrath acquaintances or friends of yours?

A. Yes, sir.

Q. Was it in your judgment necessary to have their backing in order to raise the $200,000 in order to purchase the monstrance?

A. Well, it was necessary to have someone's backing and they certainly came forward and offered.

Q. And as a result of those negotiations, and you had this agreement—let me look at the first paragraph of it. It says, "The purpose of this agreement is to set forth the duties and responsibilities of the parties hereto in regard to the acquisition, custody, sale of, distribution of proceeds received from, and expenses incurred in connection with the monstrance which is the subject of a contracted dated October 29, 1982, by and between Edward Uhart and Newton and et cetera." Do you see that?

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A. Yes, sir.

Q. And by this agreement in the second paragraph, "Atwell, Hopkins and McGrath agree to cause a loan to be made to you for $200,000 for a year", is that right?

A. Yes, sir.

Q. But that you would be responsible to the lender for the repayment of that loan, wouldn't you?

A. That's correct.

Q. "Custody of the monstrance will be in accordance with the agreement of the parties hereto, and as dictated by the lender. At the expiration of the loan term, you gentlemen agree to cause the funds advanced to be made available for an additional period of time not to exceed sixty days to allow Uhart to return the deposit as per the contract dated October 29, 1982", is that right?

A. That's right.

Q. And, then, in the third paragraph, "That the parties agree to extend the time period beyond the term contemplated, Atwell, Hopkins, and McGrath will have the option to cause additional funds, as required, to be advanced to Mr. Newton under the same terms and conditions", is that correct?

A. Right.

Q. And, "In the event that you could sell the monstrance for an amount in excess of one million dollars, the proceeds of that sale will be divided equally among those four people", is that

[75]

right?

A. The amount in excess; yes, sir.

Q. All right.

And in the next to the last paragraph, it was agreed that "During the time of the possession and right to sell contemplated by the contract of October 29, and during the time in which Atwell, Hopkins, and McGrath are in any way liable to a lender for the funds advanced

hereunder, the monstrance will be secured in a bank of the choice of James Newton and at least one of the other parties and may be withdrawn only in the presence of at least two of the parties hereto; is that right?

A. Yes, sir; that is correct.

Q. Now, in connection with that agreement, did the gentlemen agree to guarantee a loan that you made at Mercantile Bank and Trust of San Antonio?

A. Yes, sir; they did.

Q. I will now hand you what I am marking as Defendant's Exhibit F-1 and ask you, sir, if this is a true and correct copy of that guarantee agreement dated December 8, 1982?

A. This is a copy of that document; yes, sir.

Q. Your Honor, we move admission of Defendant's Exhibit F-1.

MS. MATHY: No objections.

MR. TAYLOR: No objections.

THE COURT: Will be received into evidence.

(Defendant's Exhibit F-1 admitted)

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL NO. SA-83-CA-2681

UNITED STATES OF AMERICA,
Plaintiff

v.

ONE EIGHTEENTH CENTURY COLOMBIAN MONSTRANCE, KNOWN AS THE KEEPER OF THE HOST OF SANTA CLARA, 11.3 TROY POUNDS OF GOLD WITH APPROXIMATELY 1,500 PRECIOUS AND SEMI-PRECIOUS STONES AND PEARLS,
Defendant.

(Filed March 29, 1985)

CLAIM OF JAMES W. NEWTON

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Claimant JAMES W. NEWTON, acting by and through the undersigned attorney, and files this his claim asserting his right to possession of the Monstrance, hereinafter referred to as "the property".

In support of his claim, Mr. Newton would show the Court the following:

I.

At some time after February 24, 1981, but at a date not recalled, Mr. Newton was advised by one Eduardo Uhart that the latter had purchased in Colombia and

imported into this country the property. Mr. Uhart advised Mr. Newton that the importation has been made at New York. Mr. Uhart gave no indication, either then or later, that there was anything irregular or in any way improper about his importation of the property, if any there was.

II.

Thereafter, on more than one occasion Mr. Uhart brought the property to San Antonio and at times left it with Mr. Newton to show to prospective purchasers.

III.

On information and belief, at least some of the time when the property was not in Mr. Newton's possession, it was being examined by museum officials, including those at the Denver Art Museum.

IV.

In the late summer or early fall of 1982, Mr. Newton began negotiations to acquire from Mr. Uhart the exclusive right to possession of the property. These negotiations culminated on December 16, 1982, with Mr. Newton's payment to Mr. Uhart on $200,000 through a bank in New York. In return, Mr. Uhart's granting Mr. Newton an exclusive option and right to acquire the property for $800,000, including the $200,000 paid over as stated above.

V.

At no time prior to December 16, 1982, did Mr. Newton have any indication whatsoever that there was anything at all irregular, improper, or otherwise not in order about the property or its importation into the United States, if any there was.

VI.

As an innocent acquirer for value and without notice before any institution of forfeiture proceedings, as against the Plaintiff, Mr. Newton is entitled to the right of possession and disposition of the property in accordance with his contract made with Mr. Uhart.

VII.

Plaintiff has been repeatedly advised of Mr. Newton's right to exclusive and undisturbed possession of the property but has wholly refused to return it to him, to his continuing damage. Moreover, Plaintiff has consistently and repeatedly refused to specify with any particularity what offense it alleges was committed in connection with the importation of the property into the United States, if any there was.

WHEREFORE, premises considered, Mr. Newton prays that the property be returned to him forthwith and that he recover costs and such damages against Plaintiff as to which he may show himself justly entitled.

Respectfully submitted,

OPPENHEIMER, ROSENBERG, KELLEHER & WHEATLEY, INC.

By: /s/ SEAGAL V. WHEATLEY
Seagal V. Wheatley
711 Navarro, Suite 620
San Antonio, Texas 78205
512/224-2000
State Bar No.: 21252000

APPENDIX E

BC:HW:mjc
185-76-347

U.S. DEPARTMENT OF JUSTICE

Washington, D.C. 20530

Dick Terrell Brown, Esquire
900 Milam Building
San Antonio, Texas 78205

Re: United States v. One Eighteen Century
Monstrance SA-83-CA-2681

Dear Mr. Brown:

The Petition for Remission or Mitigation of Forfeiture of the referenced Monstrance filed by you on behalf of James W. Newton has been denied. The petition has been denied because the evidence uncovered discloses that Mr. Newton has failed to establish that he has a good faith interest in the subject property. *See* 28 C.F.R. § 9.5(c) (1), (2) and (3). The United States Attorney is being advised that the petition has been denied.

If you have any newly acquired evidence or evidence not previously considered which you believe would constitute a basis upon which the Attorney General might reverse his denial of the petition, you may apply for reconsideration of our action. In that event, any such application should be sent directly to and received in this office within 20 days from the date of this letter. Two copies of any such application should be furnished simultaneously to Assistant United States Attorney Pam-

ela Mathy at the United States Attorney's Office, Western District of Texas, 655 E. Durango Boulevard, Hemisfair Plaza, San Antonio, Texas 78206 who is being advised that in the event she does not receive copies of such an application within 20 days from the date of this letter she is to proceed with the forfeiture. You may, of course, still contest the forfeiture in court, assuming the presence of a valid defense, by filing an Answer to the Complaint for Forfeiture if you have not already done so and if the time to Answer has not expired.

Sincerely yours,

BRAD CATES
Director
Asset Forfeiture Office
Criminal Division